IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No 609 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

J.R. DYEING & PRINTING MILLS PVT. LTD.

Versus

A.C.I.T.

Appearance:

1. TAX APPEAL No. 609 of 2003
MR RK PATEL for Petitioner No. 1
MR BB NAIK for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 17/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

Admit.

Mr. B.B. Naik, learned Standing Counsel for the Revenue, waives service of notice of admission.

In the facts and circumstances of the case, we have heard the appeal today for final disposal.

2. This appeal under Section 260A of the Income-tax Act, 1961 ('the Act' for short) is filed against judgment and order dated 20.9.2002 passed by the Income-tax Appellate Tribunal, Ahmedabad "B" Bench, Ahmedabad ("the Tribunal" for short), in Income-tax Appeal No.2985/AHD/1996 for the assessment year 1992-93 and also the order dated 20.6.2003 passed by the Tribunal in Misc. Application No.10/Ahd/2003.

3. The appellant is a Company being regularly assessed to income-tax at Surat. The appellant is engaged in dyeing and printing activities on manufacturing basis as well as job work basis. For Assessment Year 1992-93, return of income was filed which was processed by the Income-tax Department and ultimately order was framed under section 143 (3) of the Act whereby the Assessing Officer vide his order dated 14.3.1995 made certain additions and disallowances:-

One of the additions/disallowances was in respect of Rs.3,78,112/- on account of grey fabrics which was held to be not accounted by the appellant in the books of accounts.

Being aggrieved by this action of the Assessing Officer, the appellant preferred First Appeal before the Commissioner of Income-tax (Appeals). The learned CIT (Appeals) considered the controversy and deleted the addition/disallowances made by the Assessing Officer.

The Department preferred Second Appeal before the Tribunal against the relief granted by the CIT (Appeals). The Tribunal considered the issue and by order dated 20.9.2002 reversed the order of the CIT (Appeals) by restoring the addition/disallowance of Rs.3,78,112/- made by the Assessing Officer.

The appellant preferred Miscellaneous Application before the Tribunal since in view of the appellant there were mistakes apparent on record rectifiable by the Tribunal within its jurisdiction under Section 254 (2) of the Act.

The Tribunal heard the Miscellaneous Application preferred by the appellant and passed an order dated 26.6.2003 in the Miscellaneous Application rejecting the application filed by the appellant.

4. The appellant has raised three substantial questions of law, but it appears that the controversy has shrunk down to the following two questions:

(i) Whether on the facts and in the circumstances of the case, on appreciation of explanation and evidence on record, the Tribunal is right in law in confirming addition referable to alleged unaccounted sales even though there is no difference in the aggregate amount or value of sale/turn over?

(ii) If answer to question No.(i) is in the affirmative, whether the Tribunal is right in law in confirming addition of the entire amount of unaccounted sales being the amount Rs.3,78,112/and in not confirming addition of only the profit embedded in the said unaccounted sales of Rs.3,78,112/-?

5. As regards question No.1, Mr. R.K. Patel, learned counsel for the appellant, reiterated the submissions which were made on behalf of the assessee before the Tribunal. We, however, do not find that such submissions raise any substantial question of law. The finding given by the Tribunal is a finding of fact. During the course of search made by the Excise Department, a diary was found which contained figures of sales for the months of September and October 1991 in terms of quantity of meters and in terms of amount. While the figures mentioned in the diary tally with the figures mentioned in the assessee's regular books of accounts in terms of the amount involved, there is discrepancy in the figures relating to the quantity as under:

Sales particulars as per	Sept.1991 Mts.	Amount	Oct. 1991 Mts.	Amount
A. Diary so seized.	182685.60	3346718.00	242290.65	5281953.00
B. Regular books of account.	165880.00	3346718.00	242290.65	5281953.00
Difference	16805.60	Nil	Nil	Nil

The Tribunal was, therefore, right in holding that the difference in quantity was for 16,805.60 Mts. and, therefore, the assessing officer had rightly held that unaccounted sales of the said quantity were required to be taken into consideration for the assessment of income for the year under consideration.

6. As far as the second question is concerned, Mr. R.K. Patel, learned counsel for the appellant, has vehemently submitted that the law on the question has been well settled in the case of CIT v. President Industries (2002) 258 ITR 654 wherein it has been laid down that addition could be made only to the extent of profit on such sales. It is submitted that whatever expenses the assessee had incurred for purchasing the material of 16,805.60 Mt. of cloth and for processing said cloth, the assessee is entitled to have the said amounts deducted from Rs.3,78,112/- and only the balance amount of profit could be added as income arising from the so-called unaccounted sales.

7. On the other hand, Mr. B.B. Naik, learned standing counsel for the revenue, has submitted that in the President Industries' case (supra) this Court has not laid down any blanket rule that only the profit component of the sale price should be treated as income. This Court has also added a rider in the said decision that if the investment by way of incurring the cost in purchasing raw-materials made by the assessee was disclosed then only the excess over the cost incurred could be treated as profit, otherwise if the said investment was also not disclosed, the entire sale proceeds would be added in the income for the relevant year.

It is submitted that there is no finding given by the Tribunal that such investment was disclosed and hence addition made by the Tribunal of the entire amount of Rd.3,78,112/- is justified.

8. In rejoinder, Mr. R.K. Patel, learned counsel for the appellant, has submitted that the Tribunal has also not given any finding that the investment by way of purchasing the raw-materials made by the assessee was suppressed and, therefore, the principle laid down in President Industries' case (supra) is squarely applicable.

9. Having heard the learned counsel for the parties and having gone through the decision of this Court in President Industries case (supra) and in absence of any finding given by the Tribunal either way, we are of the

view that it would not be possible to give any definite answer to question No.2 without having a finding on the important question whether investment made for purchasing raw-materials for 16,805.60 Mts. of cloth made by the assessee was disclosed or suppressed.

10. Of course, it is the contention of the learned counsel for the revenue that since this contention was not raised, the Tribunal was justified in restoring the addition of the entire amount of Rs.3,78,112/- which was made by the assessing officer but deleted by the CIT (Appeals).

The learned counsel for the assessee submits that this is a question of law and the assessee had raised the question by filing a miscellaneous application for the purpose of permitting the assessee to cite the decision in President Industries case (supra) but the Tribunal erroneously rejected he said miscellaneous application. The learned counsel has also relied on the decision dated 3.11.2003 of the Tribunal in Income-Tax Appeal No. 2797 of 1997 for the assessment year 1992-93 in the case of CIT v. J.R. Synthetics Pvt. Ltd.

11. In the aforesaid decision, the Tribunal found force in the assessee's representation that as per judgment of this Court in CIT v. President Industries (Supra) "instead of adding the entire amount of sale only estimated profit embedded in the undisclosed sale is to be added in the total income of the assessee as there is no finding of the revenue that there was suppression of investment in acquiring goods which were subjected to undisclosed sales. Under the circumstances and in view of the above judgment (in President Industries case) it will be fair and reasonable to both the sides if an addition is made only on account of net profit calculated at the rate of profit declared by the assessee on the total amount...."

(emphasis supplied)

It appears to us in the facts of the instant case also that the Tribunal should not have restored the entire addition made by the assessing officer of Rs.3,78,112/- without giving the finding that there was suppression of investment in acquiring goods which are subjected to undisclosed sales.

16. In view of the above discussion, without disturbing the finding of fact given by the Tribunal that there were unaccounted sales of 16805.60 Mts. of cloth in September/October, 1999, we set aside the order of the

Tribunal in so far as the Tribunal has made addition of the entire amount Rs.3,78,112/- and remand the matter to the Tribunal for taking a fresh decision in the matter after considering the question whether there was suppression of investment in acquiring the goods which were subjected to undisclosed sales. This shall be done after giving the parties an opportunity of being heard.

13. The appeal is accordingly allowed to the aforesaid extent with no order as to costs.

(M.S. Shah, J.)

(A.M. Kapadia, J.)

(karan)